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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 257

LUCILLE A. BREECE, administratrix *ad prosequendum* of the Estate of JERRY C. BREECE,

Petitioner,

vs.

J. F. CHAPMAN & SON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FEINBERG, DEE & FEINBERG,
Attorneys for Petitioner,
554 Broadway,
Bayonne, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Statute Cited

28 U.S.C.A.:

Sec. 1254(1) 2

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No. ____

LUCILLE A. BREECE, administratrix *ad prosequendum* of the Estate of Jerry C. Breece,

Petitioner,

vs.

J. F. CHAPMAN & SON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on April 17, 1962.

Opinions Below

No opinion was rendered by the District Court, but the judgment of that court is printed in the Record (R429).*

The opinion of the Court of Appeals is unreported, but is printed in the Appendix (A1a).**

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* Page references to the Record ("R") refer to the Appendix filed with the Appellant's Brief in the Court of Appeals.

** Page references to the Appendix ("A") refer to the Appendix annexed to this petition.

Jurisdiction

The Judgment of the Court of Appeals was entered on April 17, 1962. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. §1254(1).

Questions Presented

1. Where both plaintiff and defendant agreed that the substantive law of New Jersey governed, and where that law required submitting to the jury the disputed issue of whether the decedent died as a result of the inherently dangerous nature of the work being performed, was the Court of Appeals justified in disregarding the law of New Jersey by redetermining the issue on appeal and setting aside the decision of the jury?

2. Does not the opinion of the Court of Appeals in the case *sub judice* conflict with decisions in the courts of the State of New Jersey as well as with decisions from other circuits?

3. Has not the Court of Appeals deviated so widely from the accepted course of judicial review as to make necessary the granting of a writ of certiorari?

Statutes and Regulations Involved

None.

Statement

This is a negligence action for wrongful death originally commenced by the plaintiff in the Superior Court of New Jersey (R3). Defendant removed the cause to the United States District Court for the District of New Jersey on the sole ground of diversity of citizenship (R5).

The decedent, plaintiff's husband, was killed while working on a pipeline construction job in Bayonne, New Jersey

(R14). He was employed by Construction Service Company, a sub-contractor of the defendant (R255). His death was occasioned by the bursting of a hose through which compressed air was being conducted into a pipe which decedent was testing. (R118). At the time of his death decedent was working at the bottom of a trench approximately 16 to 17 feet in depth (R107), about 4 to 5 feet in width (R28) and about 3,000 feet in length. (R18). The bottom of the trench contained approximately 2 to 4 feet of ground water (R93), and the trench itself contained shoring consisting of metal jacks running across its width at varying heights (R413, 108). The trench was so close to an existing concrete bridge abutment that there was concern that the bridge itself might collapse (R44).

Decedent's job at the time of his death consisted of testing the pipeline which had already been laid in the trench (R19). The pipeline being tested actually consisted of two pipes each 12 inches in diameter and 3,000 feet in length (R19). The pipeline test consisted of forcing compressed air from a compressor into the pipe until the pressure in the entire 3,000 feet of pipe reached 100 pounds per square inch (R19). The pressure in the pipeline had reached at least 98 pounds per square inch when the air hose burst (R338) causing what was described as a "loud explosion" (R106) or a "loud blast" (R351). Approximately 15 minutes later after the debris settled decedent's body was found at the bottom of the trench with a "hole in the side of his head" (R117; 118; 97). The air hose had burst at a point where it had been previously mended (R32, 100, 53). The mend had been made by using a smooth piece of pipe instead of a grooved hose mender (R189). This type of splice produced an unsafe union (R187).

The trial in the District Court consumed six days (R429). Plaintiff predicated her case upon the theory that decedent, at the time of his death, was engaged in work which

was inherently dangerous and that as a result, defendant, as prime contractor, was legally responsible for decedent's death even though it had entrusted the work to a sub-contractor. The case was submitted to the jury upon this theory, and the jury returned a verdict for plaintiff in the sum of $85,000.00.

The Court of Appeals for the Third Circuit reversed the judgment and directed the District Court to enter judgment in favor of the defendant.

REASONS FOR GRANTING THE WRIT

POINT I

The decision of the Court of Appeals conflicts with applicable State law.

The District Court submitted to the jury the issues of inherent danger of the activity in question and the causal connection between the inherent danger and decedent's death with a full and complete charge (R393, 394, 395). After deliberation the jury returned a verdict for plaintiff. The Court of Appeals in reversing the determination of the jury stated that the cause of decedent's death "stemmed not from the job itself but * * * from the causal or collateral negligence of persons engaged in it under particular circumstances" (A9a).

What the Court of Appeals did was to redetermine a disputed issue of fact which had been properly submitted to the jury and to arrive at a conclusion at variance with the decision of the jury. In so holding, the Court of Appeals has usurped the province of the jury and has thereby acted in conflict with the substantive law of New Jersey.

In *Majestic Realty Associates v. Toti Contracting Co., Inc.*, 30 N. J. 425, 153 A. 2d 321 (Sup. Ct. 1959), it was stated that:

"* * * where the minds of reasonable men might differ as to whether the activity contracted for the landowner is inherently dangerous or involves a peculiar risk of harm to others unless special precautions are taken, the issue is for jury determination. Whalen v. Shivek, supra, 93 N. E. 2d at page 400. On the facts of this case, as outlined above, we have no hesitancy in saying that such course should have been pursued."

In *Araujo* v. *New Jersey Natural Gas Co.*, 62 N. J. Super. 88, 162 A. 2d 299 (App. Div. 1960) cert. den. 33 N. J. 328, 164 A. 2d 380 (Sup. Ct. 1960), an accident occurred where gas pipes were laid in a ditch 33 inches in depth. The trial court dismissed the suit at the conclusion of plaintiff's case. On appeal the Appellate Division held that the inherently dangerous activity doctrine applied and that the case should have been submitted to the jury for determination.

Decisions such as these are examples of the well established rule of the New Jersey courts that the issue of proximate cause of an injury and other such factual issues are to be determined not by the court, but by the jury. As stated in *Vaduro* v. *Yellow Cab Co. of Camden*, 6 N. J. 102, 107, 77 A. 2d 459 (Sup. Ct. 1950):

"Where, as here, there is a factual dispute as to the events and circumstances which caused the injuries, proximate cause is a jury question."

Furthermore, the determination of a jury on a factual issue is, under the law of New Jersey, entitled to great weight. As stated in *Mead* v. *Wiley Methodist Episcopal Church*, 23 N. J. Super. 342, 358, 93 A. 2d 9 (App. Div. 1952):

"* * * Regardless of what factual findings we might reach as the result of our review of the evidence, we